IN THE COURT OF APPEALS OF IOWA

No. 17-1745
Filed January 9, 2019

GERHILD KRAPF,
Plaintiff-Appellant,

vs.

BRUCE RASTETTER, KATIE MULHOLLAND, MILT DAKOVICH, LARRY MCKIBBEN, MARY ANDRINGA, and BOARD OF REGENTS OF THE STATE OF IOWA,
Defendants-Appellees.

Appeal from the Iowa District Court for Polk County, William P. Kelly, Judge.

Plaintiff appeals from the district court's grant of summary judgment in an action brought pursuant to the Iowa Open Meetings Act. **AFFIRMED.**

Gary Dickey of Dickey & Campbell Law Firm, PLC, Des Moines, for appellant.

Richard J. Sapp and Leslie C. Behaunek of Nyemaster Goode, P.C., Des Moines, for appellees Bruce Rastetter, Katie Mulholland, and Mary Andringa.

Thomas J. Miller, Attorney General, and George A. Carroll, Assistant Attorney General, for appellees Milt Dakovich, Larry McKibben, and Board of Regents of the State of Iowa.

Ivan T. Webber and Maria E. Brownell of Ahlers & Cooney, P.C., Des Moines, for amici curiae Iowa Association of Municipal Utilities, Iowa League of Cities, Iowa State Association of Counties, and Iowa Association of School Boards.

Alan R. Ostergren of Iowa County Attorneys Association, Muscatine, for amicus curiae Iowa County Attorneys Association.

Heard by Vogel, P.J., and Vaitheswaran and McDonald, JJ.

McDONALD, Judge.

This is an appeal in an action initiated pursuant to the Iowa Open Meetings Act ("IOMA"), Iowa Code Chapter 21 (2015). The plaintiff, Gerhild Krapf, alleged the Iowa Board of Regents and five of its members violated IOMA on July 30, 2015, when five of the regents had separate but serial contact with Bruce Harreld regarding the vacancy for the position of President of the University of Iowa. Krapf alleged these separate but serial meetings constituted a single "meeting" within the meaning of IOMA. *See* Iowa Code § 21.2(2) (defining meeting). She alleged the "meeting" violated IOMA because it was held without notice, was not conducted in open session, and was held without minutes being taken. The district court granted summary judgment in favor of the defendants, and Krapf timely filed this appeal.

The summary judgment record reflects the following. At the time of the alleged meeting, Harreld was not a candidate for the position of university president, but he was interested in meeting with some of the regents to obtain more information regarding the position to determine whether he would be a good fit for the position. Board president Bruce Rastetter arranged for Harreld to meet with some of the regents. On July 30, Rastetter picked up Harreld from the airport and drove him to Rastetter's place of business in Ames. Rastetter left, and Harreld met with regents Mary Andringa and Larry McKibben. Immediately after the meeting with Andringa and McKibben, Harreld met with regents Katie Mulholland and Milt Dakovich. In the meetings, the regents provided Harreld with information regarding the position and the university, and Harreld provided information regarding himself. Eventually, Harreld submitted an application for the position. A

twenty-one person search committee selected four finalists to present to the board. Harreld was one of the finalists. The board held open interview sessions with each of the finalists and ultimately selected Harreld to serve as President of the University of Iowa.

Summary judgment is proper when there is no genuine issue of material fact and "the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981(3). Accordingly, appellate review is "limited to whether a genuine issue of material fact exists and whether the district court correctly applied the law." *Linn v. Montgomery*, 903 N.W.2d 337, 342 (Iowa 2017) (quoting *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008)). Additionally, "[a]ctions to enforce [IOMA] are ordinary actions at law. Our review of such actions is for correction of errors at law." *Dooley v. Johnson Cty. Bd. of Supervisors*, No. 08-0195, 2008 WL 5234382, at *2 (Iowa Ct. App. Dec. 17, 2008) (citations omitted). As the party seeking to enforce IOMA, Krapf bears the burden of proving IOMA applies to the identified group of individuals and gathering. *See* Iowa Code § 21.6(2).

IOMA defines "meeting" as follows:

> "Meeting" means a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Meetings shall not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter.

Id. § 21.2(2); *Hutchison v. Shull*, 878 N.W.2d 221, 231 (Iowa 2016). The "definition of 'meeting' is confined to the first sentence of section [21.2(2)]." *Telegraph*

Herald, Inc. v. City of Dubuque, 297 N.W.2d 529, 532 (Iowa 1980). *See id.* "Deliberation generally involves 'discussion and evaluative processes in arriving at a decision or policy.'" *Hutchison*, 878 N.W.2d at 232 n.1 (quoting *Hettinga v. Dallas Cty. Bd. of Adjustment*, 375 N.W.2d 293, 295 (Iowa Ct. App. 1985)).

We conclude the district court did not err in granting the defendants' motion for summary judgment. It is not disputed that a majority of the nine-member board of regents never gathered together in one place or location. Rastetter picked up Harreld from the airport. Harreld then met with Andringa and McKibben. Immediately after that, Harreld met with Mulholland and Dakovich. Thus, there was never a majority of the members present at a gathering within the meaning of the act. There was also no deliberation within the meaning of the act. There is nothing in the summary judgment record to show the five regents discussed amongst themselves the individual meetings with Harreld.

Krapf argues summary judgment was nonetheless inappropriate because there is a disputed issue on whether these separate meetings were serial submajority gatherings, which Krapf alleges would constitute a single "meeting" within the meaning of IOMA. Under Krapf's proposed rule, any time the majority of the members of a governmental body hold a series of discussions within close temporal proximity to each other, even when there is no majority present at any point in time, the series of discussions are transformed into a public meeting subject to IOMA. For example, during oral argument, Krapf contended that if a member of a five-person board of supervisors held an informal discussion with another supervisor on an issue and then immediately held another separate

discussion with a different supervisor on the same issue, the discussions would qualify as a meeting under IOMA.

Krapf's proposed serial submajority rule defies "common sense and practical reason." *Bradshaw v. Cedar Rapids Airport Comm'n*, 903 N.W.2d 355, 363 (Iowa Ct. App. 2017). "The law 'cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.'" *Id.* (quoting Oliver Wendell Holmes, Jr., The Common Law 1 (Dover ed. 1991) [hereinafter Common Law]). "'[T]he secret root from which the law draws all the juices of life' are considerations of expediency and practicality." *Id.* (quoting Common Law, at 35). The plaintiff's proposed rule is neither expedient nor practical.

More important, the plaintiff's proposed rule was rejected in the materially indistinguishable *Telegraph Herald* case. In that case, members of a governmental body met with a job candidate in a series of submajority gatherings prior to the body making an official hiring determination. *See Telegraph Herald*, 297 N.W.2d at 531. The court held the series of submajority meetings did not constitute a meeting within the meaning of IOMA. *See id.* at 534. As the court explained, "Any other rule would hamstring the progress of governmental bodies, and impose intolerable time burdens on unpaid officeholders." *Id.* As in *Telegraph Herald*, the individual members of the board of regents met with Harreld in personal interviews. At the time of the interviews, Harreld was not a candidate for the open position. In these meetings, as in *Telegraph Herald*, the members of the governmental body lacked the capacity and intent to deliberate and/or act in their official capacities due to the lack of a majority of the members being present at the gathering. *See, e.g.*, *Dewey v. Redevelopment Agency of City of Reno*, 64 P.3d

1070, 1077 (Nev. 2003) ("It is the collective discussion of an issue with the goal of reaching a decision that constitutes a deliberation under California's open meeting law. Discussions with less than a quorum are not deliberations within the meaning of the act. Here, no quorum was physically present at either briefing. Thus, a collective discussion equaling a deliberation could not take place unless a quorum was constructively present.").

Our conclusion that *Telegraph Herald* is controlling is bolstered by legislative history. On multiple occasions, the legislature considered amending the statutory text to encompass the rule Krapf now proposes. *See Hutchison*, 878 N.W.2d at 233 n.3. On those occasions, the legislature declined to so amend the statute. *See id.* (noting the "legislature twice considered, but failed to pass, proposed bills that would have amended section 21.2(2) to address serial submajority gatherings"). The legislature's acquiescence in the supreme court's interpretation of the statute is a compelling reason to continue to adhere to the *Telegraph Herald* rule. *See Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013) ("When many years pass following such a case without a legislative response, we assume the legislature has acquiesced in our interpretation.").

We have considered the parties' arguments, whether or not set forth in full herein, and we affirm the judgment of the district court.

AFFIRMED.

Vogel, P.J., concurs; Vaitheswaran, J., concurs specially.

VAITHESWARAN, Judge (concurring specially).

I specially concur. In my view, the Iowa Supreme Court has recognized that serial submajority gatherings of public bodies may violate the Iowa Open Meetings Law. *See Telegraph Herald, Inc. v. City of Dubuque*, 297 N.W.2d 529, 533–34 (Iowa 1980) (stating open meetings laws "do not prohibit gatherings of less than a majority of the governing body where decisions are not made and official actions are not taken" and stating there must be "temporal proximity . . . among members of the governmental body."); *accord Hutchison v. Shull,* 878 N.W.2d 221, 232 (Iowa 2016) (noting *Telegraph Herald* considered the theory of "whether serial submajority gatherings could constitute an informal meeting to which the open meetings law applies") I agree, however, that the gatherings in this case did not violate the Iowa Open Meetings Law.